

THE FEDERAL ADVISORY COMMITTEE ACT

Many of our clients are not even aware that the Federal Advisory Committee Act (FACA) exists. Those who are aware of FACA are never sure if the group they would like to assemble would run afoul of FACA. In an effort to provide some general "user friendly" guidance in this area to our clients, I prepared a summary of FACA. It is intended as a starting point so that the client has some guideposts when considering soliciting input from entities outside the Federal government. If a plan is formulated with this guidance in mind the client is less likely to discover after much effort is already expended that the group they intend to use is subject to FACA.

I. What is the Federal Advisory Committee Act (FACA)? (see 5 U.S.C., App., and 41 CFR 102-3)

FACA governs the establishment, operation, and termination of advisory committees within the executive branch of the Federal Government. The Act and associated implementing regulations define what constitutes a Federal advisory committee and provide general procedures to follow for the operation of these advisory committees. In addition, the Act and regulations are designed to assure that the Congress and the public are kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees.

II. What is an advisory committee subject to the Act?

1. An advisory committee subject to the Act, means any committee, board, commission, council, conference, panel, task force, or other similar group, which is established by statute, or *established or utilized* by the President or *by an agency official*, for the *purpose of obtaining advice or recommendations* for the President or on issues or policies within the scope of an agency official's responsibilities. A committee is *utilized* within the meaning of the Act if a Federal office or agency exercises *actual management or control* over its operation.

- a. *Discretionary advisory committee* means any advisory committee that is established under the authority of an agency head or authorized by statute.
- b. *Non-discretionary advisory committee* means any advisory committee either required by statute or by Presidential directive. A *non-discretionary advisory committee* required by statute generally is identified specifically in a statute by name, purpose, or functions, and its establishment or termination is beyond the legal discretion of an agency head.

2. THIS DISCUSSION IS LIMITED TO *DISCRETIONARY* ADVISORY COMMITTEES.

III. How Are Discretionary Advisory Committees Established?

1. **Standard for establishment:** A discretionary advisory committee may be established only when it is essential to the conduct of agency business and when the information to be obtained is not already available through another advisory committee or source within the Federal Government.
2. **By Whom?** It is established by an agency under general authority in title 5 of the United States Code or under other general agency-authorizing statutes.
3. **Required Consultation:** Before establishing discretionary advisory committee and filing the required charter (see paragraph XX) the agency head must consult with the "Secretariat."

Committee Management Secretariat ("Secretariat"), means the organization established pursuant to section 7(a) of the Act, which is responsible for all matters relating to advisory committees, and carries out the responsibilities of the Administrator under the Act and Executive Order 12024 (3 CFR, 1977 Comp., p. 158).

- a. *Required information: Consultations*
must, as a minimum, contain the following information:

- i) *Explanation of need.*
An explanation stating why the advisory committee is essential to the conduct of agency business and in the public interest;
- ii) *Lack of duplication of resources.* An explanation stating why the advisory committee's functions cannot be performed by the agency, another existing committee, or other means such as a public hearing; and
- iii) *Fairly balanced membership.* A description of the agency's plan to attain fairly balanced membership. The plan will ensure that, in the selection of members for the advisory committee, the agency will consider a cross-section of those directly affected, interested, and qualified, as appropriate to the nature and functions of the advisory committee. Advisory committees requiring technical expertise should include persons with demonstrated professional or personal qualifications and experience relevant to the functions and tasks to be performed.

1. **Charter:** No advisory committee may meet or take any action until a charter has been filed.

a. **Filing:** A charter must be filed with:

- i) The agency head;
- ii) The standing committees of the Senate and the House of Representatives having legislative jurisdiction of the agency, the date of filing with which constitutes the official date of establishment for the advisory committee;
- iii) The Library of Congress; and
- iv) The Secretariat.

a. **Purpose and contents.** An advisory committee charter is intended to provide a description of an advisory committee's mission, goals, and objectives. It also provides a basis for evaluating an advisory committee's progress and effectiveness. The charter must contain certain required information.

1. **Notice:** A notice to the public in the **Federal Register** is required.

a. **Procedure.** Upon receiving notice from the Secretariat that its review is complete, the agency must publish a notice in the **Federal Register** announcing that the advisory committee is being established. The notice must describe the nature and purpose of the advisory committee and affirm that the advisory committee is necessary and in the public interest.

b. **Time required for notices.** Must appear at least 15 calendar days before the charter is filed.

IV. What rules and policies govern a FACA committee?

1. *Advisory functions only.* The function of advisory committees is advisory only.
2. *Balanced membership.* An advisory committee must be fairly balanced in its membership in terms of the points of view represented and the functions to be performed.

3. *Open meetings.* Advisory committee meetings must be open to the public (there are exceptions).

- a. Each advisory committee meeting must be held at a reasonable time and in a manner or place reasonably accessible to the public.
- b. A notice in the **Federal Register** must be published at least 15 calendar days prior to an advisory committee meeting

V. How and When is a Discretionary Advisory Committee Terminated?

An advisory committee must be terminated when:

- (1) The stated objectives of the committee have been accomplished;
- (2) The subject matter or work of the committee has become obsolete by the passing of time or the assumption of the committee's functions by another entity;
- (3) The agency determines that the cost of operation is excessive in relation to the benefits accruing to the Federal Government; and
- (4) Upon the expiration of a period not to exceed two years, unless renewed;

VI. What types of committees or groups are NOT covered by the Act?

(d) *Committees not actually managed or controlled by the executive branch.* Any committee or group created by non-Federal entities (such as a contractor or private organization), provided that these committees or groups are not actually managed or controlled by the executive branch;

(e) *Groups assembled to provide individual advice.* Any group that meets with a Federal official(s), including a public meeting, where advice is sought from the attendees on an individual basis and not from the group as a whole;

(f) *Groups assembled to exchange facts or information.* Any group that meets with a Federal official(s) for the purpose of exchanging facts or information;

g) *Intergovernmental committees.* Any committee composed wholly of full-time or permanent part-time officers or employees of the Federal Government and elected officers of State, local and tribal governments (or their designated employees with authority to act on their behalf), acting in their official capacities. However, the purpose of such a committee must be solely to exchange views, information, or advice relating to the management or implementation of Federal programs established pursuant to statute, that explicitly or inherently share intergovernmental responsibilities or administration (There are OMB guidelines);

(h) *Intragovernmental committees.* Any committee composed wholly of full-time or permanent part-time officers or employees of the Federal Government;

i) *Local civic groups*. Any local civic group whose primary function is that of rendering a public service with respect to a Federal program;

(j) *Groups established to advise State or local officials*. Any State or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies.

VII. Major FACA Indicators.

7. Is the Committee "established" or "utilized" by the agency?

- Does agency manage or control group's membership or determine its' composition?
- Does agency manage or control group's agenda?
- Does agency fund the group?

8. Does the group provide advice or recommendations *as a group*?

VII. What may the agency do and still NOT create a group subject to FACA?

7. Agency official may meet with a local citizens group.
8. Agency official may attend meetings where advice is offered to the government during the course of the meeting.
9. Agency official may participate in meetings as a member.
10. Agency may meet with contractors or licensees to discuss specific matters involving the contract or license. It may also meet to discuss its' efforts to ensure compliance with its' regulations.
11. Agency may meet with a group where the attendees are providing individual advice.

In conclusion, if you intend to solicit information or advice from a group outside the USG, it is in your best interests to consider these FACA guidelines up front. It is far easier to make some minor adjustments in the nature of the group and the manner in which you use the group than to subject yourself to FACA requirements.

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